

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PAUL M. GRILL, II)	
Claimant)	
VS.)	
)	Docket No. 220,817
STATE OF KANSAS)	
Respondent)	
AND)	
)	
STATE SELF INSURANCE FUND)	
Insurance Carrier)	

ORDER

Respondent requests review of the preliminary hearing Order For Medical Treatment entered by Administrative Law Judge Floyd V. Palmer dated May 29, 1997.

ISSUES

In its Application for Review, respondent lists the following as issues for Appeals Board review:

“1. Judge Palmer erred in finding that Claimant gave legally sufficient notice under K.S.A. 44-520, in ordering Respondent to provide medical treatment and in granting temporary total disability benefits in the event Claimant is taken off work.

“2. Judge Palmer applied an incorrect legal standard in finding that Claimant’s supervisor had ‘actual knowledge of the injury.’ K.S.A. 44-520 requires a finding of actual knowledge of the ‘accident’.

“3. The evidence presented provides absolutely no factual basis for the finding that Claimant had ‘just cause’ for failing to report his accidental injury within 10 days as required by law.

“4. K.S.A. 44-534(a)(2) provides the Board with jurisdiction to hear appeals of preliminary matters when compensability is an issue. Compensability is an issue as the Respondent asserts that Claimant did not provide timely notice under K.S.A. 44-520 in that more than 10 days from the date of accident expired prior to Claimant’s giving proper notice, that no ‘just cause’ existed, and that the ALJ relied upon an incorrect legal standard.”

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the briefs of the parties, the Appeals Board finds for purposes of preliminary hearing as follows:

The jurisdiction of the Appeals Board to review preliminary hearing orders entered pursuant to K.S.A. 1996 Supp. 44-534a is limited to issues involving the Administrative Law Judge’s jurisdiction in granting or denying the relief requested at the preliminary hearing. See K.S.A. 1996 Supp. 44-551(b)(2)(A). “A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee’s employment, whether notice is given or claim timely made, or whether defenses apply, shall be considered jurisdictional, and subject to review by the board.” K.S.A. 1996 Supp. 44-534a(a)(2). Accordingly, the issues raised by respondent as to notice of accident are subject to review on an appeal from a preliminary hearing order.

The Administrative Law Judge based his award of benefits upon respondent’s actual knowledge of the claimant’s injury together with a finding that although claimant failed to prove he gave notice of accident to the employer within ten days claimant established just cause for his failure to give said notice as required by K.S.A. 44-520. The Administrative Law Judge also decided the issues of injury by accident and whether the claimant’s injury arose out of and in the course of his employment with respondent on the dates alleged. However, as the appeal from the Administrative Law Judge’s Order was based upon the issue of notice, that is the sole issue that will be addressed by the Board.

K.S.A. 44-520 provides:

“Notice of injury. Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer’s duly

authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice."

The Administrative Law Judge did not make a specific finding as to when claimant was injured. There is considerable discussion in the respective briefs of the parties concerning the appropriate date of accident for purposes of determining whether claimant gave timely notice of accident. The Appeals Board need not decide the date of accident in order to resolve the issue of notice because notice would not have been given within ten days in any case. The issue is essentially whether just cause was established for the claimant's failure to give notice within ten days. This issue turns primarily upon the question of whether the allegation claimant did not discover his injury was work related until after seeking medical treatment, if believed, constitutes just cause.

Claimant testified he suffered personal injury to his neck and upper back by a series of accidents which occurred from carrying his luggage and equipment during September through November 1996. He first sought medical treatment the first week of November 1996. If the date of accident is determined by the last injurious exposure, then it would be fixed as having occurred through approximately November 8, 1996, when claimant's Peoria, Illinois, job ended. According to claimant he delayed seeking medical treatment until he could no longer tolerate the pain. It was not until after he had an MRI that claimant discovered he had suffered an injury by accident within the meaning of the Workers Compensation Act. Respondent alleges claimant's accident was October 28, 1996, the date claimant put on his December 16, 1996, claim form addressed to the respondent's personnel director. Notice was not otherwise given until December 5 or 6, 1996.

Claimant described incidents occurring in September and October 1996 while he was traveling back and forth to Peoria, Illinois. He continued working and his symptoms progressively worsened to the point where he sought medical treatment in November 1996. This history of a work-related injury was not given to the physicians initially. Claimant decided sometime after his condition was diagnosed as a herniated disc that the mechanism of injury was most likely work related.

Lyal G. Leibrock, M.D., agreed that the most likely cause of claimant's injury were the activities claimant described in regard to carrying his luggage, computer, and books through airports and in buildings in connection with his work. This was the history claimant

gave to Dr. Leibrock. There is no medical opinion in evidence stating that claimant's injury is not related to his employment. Although respondent's personnel director, Jamesina Evans, testified that claimant categorically denied that his injury was work related during her telephone conversation with claimant on December 6, 1996, claimant testified to the contrary.

The Appeals Board finds claimant has not met his burden of proving he gave notice of a work-related accident or injury before his December 5, 1996, telephone conference with Vicki L. Roy, administrative assistant to Jamesina Evans. Therefore, under any combination of the various alleged accident dates and dates of notice, claimant failed to give his employer notice within ten days. The claimant's testimony concerning the conversations he had with his field boss Alvin Garrett in Peoria do not satisfy the requirements of the notice statute because claimant admittedly never related his physical symptoms and complaints to an accident which occurred during his employment or as to their otherwise being the result of his work activities.

There is a dispute between claimant and respondent concerning when claimant gave notice of accident to respondent. Claimant did give respondent notice within the 75 days which is the longest time period permitted by statute for the giving of notice where just cause has been established.

The Administrative Law Judge found that just cause was shown for claimant's failure to give his employer notice of accident within ten days. Presumably this was based upon claimant's failure to attribute his injury to any specific "accident" or traumatic event or events until sometime after he learned the results of his MRI test. Claimant described his work activities as the cause of his two herniated discs during his examination by Dr. Paul S. Stein on November 13, 1996. Nevertheless, claimant waited until December 5, 1996, to impart this information to his employer. Claimant's last return trip from Peoria was on or about November 8, 1996. He had decided his back and neck conditions were possibly work related by November 13, 1996. Thus, claimant had knowledge of a work-related injury within ten days of its occurrence but did not communicate this information to his employer within ten days as required by statute. Claimant was informed of this reporting requirement by the employee handbook and by notices posted at the workplace.

The Appeals Board finds just cause has not been established. Accordingly, based upon the record as it currently exists, claimant has failed in his burden to prove timely notice was given pursuant to K.S.A. 44-520. The Order of the Administrative Law Judge should be reversed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order For Medical Treatment entered by Administrative Law Judge Floyd V. Palmer dated May 29, 1997, should be, and the same is hereby, reversed.

IT IS SO ORDERED.

Dated this ____ day of August 1997.

BOARD MEMBER

c: John M. Ostrowski, Topeka, KS
Robert E. North, Topeka, KS
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director